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In the Supreme Court of the United States

OCTOBER TERM, 1975

THE SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA,
a Religious Body, et al.,
Petitioners,

vs.

DIONISIJE MILIVOJEVICH, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

ALBERT E. JENNER, JR.
KEITH F. BODE
ROBERT L. GRAHAM
LELAND J. BADGER
EUGENE R. WEDOFF

KATZ, KARACIC & HELMIN
180 North La Salle Street
Suite 3001
Chicago, Illinois 60601
(312) 236-4111

THOMAS J. KARACIC

HALL, MEYER, FISHER, HOLMBERG, SNOOK & MAY
25 North County Street
Waukegan, Illinois 60085
(312) 244-0600

HENRY D. FISHER

Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

I. Respondents' Half-Hearted Attempts To Charge Petitioners And The Mother Church With "Fraud" Are Baseless 4

A. Respondents' Charges That The Disciplinary Proceedings Resulted From The Diocesan Reorganization Have Never Been Accepted By Any Court And Are Unsupported By The Record 5

B. The Record Does Not Support Respondents' Charges That, Separately Viewed, Either The Disciplinary Proceedings Against Dionisije Or The Diocesan Reorganization Was Fraudulent 7

1. There Is No "Property Grab Plot" 8

2. The Disciplinary Proceedings Were Not "Predetermined" 12

II. Adoption Of Respondents' "Violation Of Internal Church Rules" And "Fundamental Fairness" Standards Of Judicial Review Would Seriously Impair The Constitutional Rights Of Churches To Govern Their Own Affairs 17

III. Dionisije's Default And His Admitted Post-May 10, 1963 Ecclesiastical Offenses Destroy Respondents' Procedural Arguments And Suffice To Sustain Dionisije's Removal And Defrockment 22

Dionisije's Default 23

Dionisije's Admitted Ecclesiastical Offenses .. 25

PAGE

IV. Respondents' Attempted Cross-Appeal From The Decision Which Refused To Recognize Their Purported Secession Is Not Properly Before This Court And Is Without Merit 26

Conclusion 29

TABLE OF CASES

Cardinale v. Louisiana, 394 U.S. 437 (1969) 27

Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929) 2, 18

Hendryx v. People's United Church of Spokane, 84 P. 1123 (Wash. 1906) 19

Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952) 10

Le Duc v. Normal Park Presbyterian Church, 142 F. 2d 105 (7th Cir. 1944) 19

Merryman v. Price, 259 N.E. 2d 883 (Ind. App. 1970) 19

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 19

Turbeville v. Morris, 26 S.E.2d 821 (1943) 19

Watson v. Jones, 80 U.S. (13 Wall) 679 (1871) 18, 20-21

Werner v. International Association of Machinists, 11 Ill. App.2d 258, 137 N.E.2d 100 (2d Dist. 1956) 19

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PETITIONERS' REPLY BRIEF

Petitioners' opening brief demonstrated that the decision of the Illinois Supreme Court poses extremely serious constitutional issues by making civil courts the ultimate interpreters of internal church regulations and by sanctioning a strict and detailed review of church proceedings by the civil courts. Such intervention by the civil courts is constitutionally impermissible. Since the Serbian Orthodox Church is a hierarchical church, the decisions of its highest judicatories should generally be recognized by the civil courts.

Respondents have largely ignored the constitutional issues presented by this case. In most instances, they do not even respond to Petitioners' arguments. Rather, Respondents' brief proceeds by simply arguing that the construction which they and the Illinois Supreme Court have placed upon the internal regulations of the Serbian Orthodox Church is correct.

Respondents' brief does not dispute many of Petitioners' principal contentions. Respondents have apparently abandoned their earlier attempts to quibble about the hierarchical nature of the Serbian Orthodox Church. They concede the legitimacy of the Holy Assembly and Holy Synod and their status as the highest judicatories of the church. They do not dispute that the Holy Assembly and Holy Synod, who acted in this matter, possess exclusive jurisdiction in disciplinary proceedings relating to bishops.

Furthermore, Respondents' brief nowhere disputes Petitioners' contention that the Holy Assembly of Bishops is the supreme arbiter and interpreter of the church canons, dogma, constitutions and other sources of internal church law. When Respondents refer to the "hierarchical church" and "supreme interpreter of the internal church constitutional provisions" arguments (Resp. Br. 22), they do not dispute the accuracy of Petitioners' factual contentions, but only argue that the Illinois Supreme Court's judicial review was proper under the *Gonzalez* exception.

Indeed, Respondents rely entirely upon the *dictum* from the *Gonzalez* case. But there is considerable ambiguity as to the particular aspect of the "fraud, collusion or arbitrariness" doctrine upon which they rely.

Throughout their brief Respondents argue that the civil courts may examine ecclesiastical proceedings *de novo* to determine whether internal church regulations have been

followed, and invalidate those proceedings if a discrepancy is found. Respondents also assert that arbitrariness may result from a judicial determination of the absence of "fundamental fairness" in the ecclesiastical proceedings.

From time to time, Respondents also charge that the Mother Church acted fraudulently, a point they emphasize only at the very end of their brief. However, they have confused the entire matter by asserting that "fraud," "collusion," and "arbitrariness" really have the same meaning and that each is equivalent to the Respondents' elusive concept of "fundamental unfairness" (Resp. Br. 39-40). Respondents' analysis of fraud or bad faith is climaxed by the following strange sentence (Resp. Br. 40): "The record reflects 'bad faith' in that Belgrade [the Mother Church]* deliberately refused to follow its own rules."

The insubstantial nature of Respondents' vague and shifting "fraud" arguments is underscored by the fact that the only charge of fraud which the Dionisije faction made in 1963 and throughout the early stages of this litigation—that the disciplinary proceedings and the Diocesan reorganization had been imposed upon the Mother Church at the instigation of the Communist government of Yugoslavia—was never supported by evidence, has not been argued by Respondents in the Illinois Supreme Court or in this Court, and has now been abandoned.

We begin this reply brief by pointing out the lack of merit of Respondents' new quasi-fraud theory (pp. 4-17,

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* Throughout their brief in this Court (and in the lower courts), Respondents use the designation "Belgrade" for the Mother Church. Since there is no logical basis for using this term as an abbreviation, its use suggests an attempt to stir up anti-foreign prejudice which might somehow be applied to defeat the rights of the American church members who are loyal to the Mother Church.

infra). The next sections of the brief discuss Respondents' "violation of internal church rules" and "fundamental fairness" arguments and assess the implications of these arguments in terms of the constitutional issues presented by this appeal (pp. 17-26, *infra*). The last section of the reply brief discusses Respondents' attempt to argue, by cross-appeal, that their purported secession should be approved by this Court (pp. 26-29, *infra*).

I.

RESPONDENTS' HALF-HEARTED ATTEMPTS TO CHARGE PETITIONERS AND THE MOTHER CHURCH WITH "FRAUD" ARE BASELESS.

Respondents make charges or insinuations of fraud, bad faith, or a "plot" in a variety of ways in their brief. At times, they make the extreme argument that the Diocesan reorganization and the disciplinary proceedings against Dionisije were part of a single "plot". Respondents suggest that the disciplinary proceedings were undertaken after the Diocesan officials had opposed the Diocesan reorganization and were intended as an alternative means of seizing the Diocesan assets.

On other occasions, Respondents attack the two proceedings separately, characterizing the disciplinary proceedings as "unfair" and "predetermined" and making the old charges of a "property grab" against the Diocesan reorganization.

However these charges are characterized, they represent baseless attempts to divert this Court from the weakness of Respondents' position concerning the constitutional issues.

A. Respondents' Charges That The Disciplinary Proceedings Resulted From The Diocesan Reorganization Have Never Been Accepted By Any Court And Are Unsupported By The Record.

The opinions of the Illinois Supreme Court, Illinois Appellate Court, and the Trial Court contain no statements indicating that any of those courts perceived in the record a plot to press disciplinary charges against Dionisije in order to accomplish the Diocesan reorganization. Each court treated the disciplinary and Diocesan reorganization issues as separate and unrelated. The decisions of the Illinois Appellate Court and the Trial Court upheld the validity of the proceedings against Dionisije, but refused to recognize the Diocesan reorganization—a result hardly possible if the two were perceived to be part of a single "fraudulent plot".

Indeed, the brief filed in the Illinois Supreme Court by the Respondents other than Dionisije (the corporations which claim to embody the Diocese) took pains to emphasize the unrelated nature of the two issues. That brief stated at page 18:

> "The only other issue is the propriety of the deposition and defrockment of Bishop Dionisije, and that, as we will point out later, is a matter entirely unrelated to the question of whether the corporate defendants are entitled to retain their assets and their autonomy."

The brief further stated at page 22:

> ". . . However this Court may decide the case involving Bishop Dionisije, that decision will not be dispositive of the case as it pertains to these remaining defendants. . . . If cause exists, and if the proper procedures are followed, it cannot be denied that Belgrade has the power to depose and defrock Bishop Dionisije.

> However, that has no bearing upon the right of these defendants to their continued existence and autonomy."

Furthermore, Respondents' claim that Petitioners were "[p]revented from seizing the Diocese [sic] assets by the Diocesan authorities"* and thereafter "attempted to accomplish the same result by penal proceedings against Bishop Dionisije" (Resp. Br. 5) is flatly contrary to the record. The record shows that the delegation which visited the United States in 1962 recommended the appointment of a commission to investigate the accuracy of the charges against Dionisije.** The record also demonstrates that on May 10, 1963, before the Diocese was reorganized, the Holy Synod, on instructions from the Holy Assembly, commenced disciplinary proceedings against Dionisije and suspended him during the pendency of those proceedings (A. 167). Thus the disciplinary proceedings were recommended and actually commenced before the Diocesan reorganization was enacted and before the reaction of Diocesan officials to that reorganization was known. Respondents' "one big plot" theory is utterly without merit.

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* Respondents' statement that "the majority of all congregations in the American-Canadian Diocese" rejected the Diocesan reorganization (Resp. Br. 11) is not supported by the portions of the record Respondents cite nor by anything else in the record. It is not surprising that Dionisije's position was supported by a majority of the Diocesan Plenum since the members of the Plenum were either directly appointed by Dionisije or elected by the Sabor (church assembly) from candidates recommended to it by Dionisije.

** Respondents state that the 1962 delegation "solicited" charges. That claim is unsupported by anything in the record and is contrary to the record (PX 195A, A. 1530).

B. The Record Does Not Support Respondents' Charges That, Separately Viewed, Either The Disciplinary Proceedings Against Dionisije Or The Diocesan Reorganization Was Fraudulent.

Respondents apparently contend that each of the two proceedings (the Diocesan reorganization and the disciplinary proceedings), taken separately, was pursued in bad faith or fraudulently. These contentions also do not withstand examination.

No court in the course of this long litigation has found the existence of any fraud or bad faith. Although the Illinois Supreme Court decided both the disciplinary issue and the Diocesan reorganization issue favorably to Respondents, there is no suggestion in that Court's opinion of any finding of bad faith or fraud.

The Trial Court, which had the opportunity to observe Dionisije, Firmilian, and several other bishops and other officials of the Mother Church as witnesses, found affirmatively (A. 1776) that:

> "[N]o substantial evidence was produced by Defendants [Respondents] at the trial that fraud, collusion or arbitrariness existed in any of the actions or decisions preliminary to or during the final proceedings of the decision to defrock Bishop Dionisije made by the highest Hierarchical bodies of the Mother Church."

The Trial Court also stated with respect to the suspension, removal, deposition and defrockment of Dionisije (A. 1784) that:

> "These actions were valid, free and voluntary, binding ecclesiastical actions of the Holy Synod and Holy Assembly of the Serbian Church taken wholly within their ecclesiastical power and authority. They were in no respect tainted with fraud, collusion, duress or arbitrariness."

Indeed, Respondents considered their charges of "fraud" so weak that they did not even present them in their briefs before the Illinois Supreme Court. While the categories of "fraud, collusion or arbitrariness" are mentioned in a heading discussing the *Gonzalez* exception (Resp. Br. Ill. Sup. Ct. 29) and various epithets are applied to the actions of the Mother Church, there is no argument in those briefs that the actions of the Mother Church should be rejected as "fraudulent".

1. There Is No "Property Grab Plot".

In their original brief, Petitioners traced the evolution of the various ideas for supplying additional bishops to North America from the initial stages to the actual Diocesan reorganization on May 10, 1963. Petitioners pointed out that the boundaries of the three Dioceses generally conformed to existing episcopal districts, that the new administrators and bishops were Dionisije himself and three American clerics who were Dionisije's nominees for "assistant bishops", and that all details with respect to boundaries and property matters were left to be resolved by the Diocesan Assembly. Petitioners emphasized not only that there was an absence of evidence indicating any intention by the Mother Church to divert the Diocesan property from its trust or to compromise local autonomy, but also that the Diocesan reorganization did not and could not result in any diversion of that property from the American Church members (Pet. Br. 72-80).

Respondents merely repeat their "property grab" charges without making any effort to explain the inconsistent facts or rebut Petitioners' arguments. In response to our challenge to point to evidence of any intention by the Mother Church to reduce the autonomy of the American church or subject it or its property to additional control by foreigners (Pet. Br. 74), they offer nothing.

Respondents themselves unwittingly highlight the weakness of their "property grab" argument. The only injury from the Diocesan reorganization which Respondents can suggest is the notion that the Diocesan property would no longer be held in common by all church members in North America. Respondents suggest that a hypothetical California congregation would be prejudiced because it presumably would no longer possess a share in the Pennsylvania and Illinois real estate, which would be located in other Dioceses (Resp. Br. 10-11). Surely, this "injury" is a meager basis for a diabolical "plot" and a twelve year schism.

Indeed, Respondents' assumption that the Diocesan property would be divided among the three Dioceses may well be incorrect. Bishop Firmilian testified that no decision had yet been made and that the matter would be left up to the church national assembly (*Sabor*). He stated:

> "I do not know whether the property will be divided up and it is for the church national assembly to decide these questions. I heard the Bishop Nikanor testify that the monastery would go to the Midwest Diocese, Shadeland would go to the Eastern Diocese, and Jackson would go to the Western Diocese, but that is his opinion" (A. 537).*

Respondents charge that Firmilian was a part of the conspiracy against Dionisije. However, Firmilian testified that he had offered to return the administration of the Diocese to Dionisije if Dionisije would obey the orders of the Mother Church and if he were exonerated of the charges against him (A. 317). It was only when Dionisje

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* Nikanor himself testified that the Holy Assembly had made no decision with respect to the ownership or location of assets or property in the American/Canadian Diocese (A. 184).

refused obedience that Firmilian concluded "he was no longer my Bishop" (A. 318). Of course, Firmilian was no enemy of Dionisije. He had worked with Dionisije in America since 1941, when Dionisije had selected him to come with Dionisije to America and act as secretary of the Diocese. He had served as Dionisije's episcopal deputy in 1955-1963, and was one of the men suggested by Dionisije to be an "assistant bishop." (A. 300-05.)

All that is disclosed by Firmilian's testimony is that he made conciliatory but persistent efforts to assume the duties of the clerical positions to which he had been appointed by the church's highest judicatory. This Court has held that the fact that appointment to an ecclesiastical position incidentally determines the right to possession of church property does not transform the case into a property dispute. *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 120-121, 123 (1952). Efforts by a cleric to assume the duties of the position to which he has been appointed likewise do not constitute evidence of a nefarious plot to "grab" church property.

In order to give credence to the myth of a "property grab plot", Respondents rewrite history, church practice and church documents, and mischaracterize the American/Canadian Diocese as an independent entity loosely affiliated or confederated with the Mother Church. We have described in our original brief and will not repeat here the evidence demonstrating recognition by the church constitutions and historical practice of the unity of the Diocese with the Mother Church and its subordination in many matters to the authority of the Mother Church. (See Pet. Br. 39-41, 27a-32a)

Respondents' suggestions that the American/Canadian Diocese has been governed and its property administered

by internally elected assemblies, councils and other officials (Resp. Br. 2, 9-10) purposely ignores the vital role of chief executive of the Diocese—the Diocesan Bishop appointed by the Mother Church. We have already described the very extensive powers of the Bishop (Pet. Br. 68-69, 79), and will not repeat them here. It should suffice to refute Respondents' contentions to note that the Diocesan Bishop may veto any decisions of the Ecclesiastical Court, the Diocesan Council and other diocesan officials. In the event of continued disagreement between the Bishop and other diocesan authorities, the issue is referred to the Holy Synod of the Mother Church for resolution (PX 30, Art. 56, A. 1041). The Bishop directly controls all the monastery property in California, Pennsylvania and Illinois, and is the principal officer of all of the corporations which hold title to Diocesan property (PX 30, Art. 156, A. 1069).

Respondents also mischaracterize the origin of the American/Canadian Diocese (Resp. Br. 7-11). As Petitioners pointed out in their opening brief (Pet. Br. 66-67), there was no independent American/Canadian Diocese prior to the Holy Assembly proceedings creating that Diocese in 1921.

Although there were meetings of priests and laymen in 1913 and 1916, these meetings never resulted in any continuing church organization, and certainly never gave rise to any "independent diocese".* Similarly, although Father Mardary was dispatched by the Russian Church in 1917 to attempt to organize a Serbian Diocese in the United States (DX 33, A. 1598-1600), no diocese was organized until

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* The minutes of the 1916 meeting, for example, contain explicit references to the failure to establish any lasting church organization (DX 31, R. 5408, A. 1590). These minutes further reflect that the American parishes were not an independent organization, but rather were subservient to the Russian Church (*id.*, at A. 1597).

1921, and then only pursuant to the directive of the Mother Church in Yugoslavia* (PX 25, R. 2941-42, A. 1014).

The unsuccessful pre-1921 attempts to create a Serbian Church organization in America have no significance in characterizing the relationship between the Mother Church and the American/Canadian Diocese after 1921. The American/Canadian Diocese did not come into existence until it was created by the Mother Church in 1921. As Petitioners pointed out in their opening brief (Pet. Br. 7-8, fn.), none of the proceedings relating to the creation of that diocese in 1921 refer to any negotiations, compacts, or agreements with any pre-existing church organization in the United States or Canada (PX 25, R. 2941-42, A. 1012).

2. The Disciplinary Proceedings Were Not "Predetermined".

In an effort to cast doubt upon the Mother Church's good faith in the disciplinary proceedings involving Dionisije, Respondents have focused on four shreds of evidence. When the record is analyzed, none of these items supports their argument.

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* In announcing his appointment as Administrator in a 1923 circular letter to all priests, Father Mardary confirmed that the American/Canadian Diocese was "established two years ago by the decision of Bishop's Council" (DX 35, A. 1600). Similarly, at a conference of priests in 1923, Father Mardary specifically made reference to "this newly formed" American/Canadian Diocese (DX 37, A. 1602). The 1921 Holy Assembly minutes direct the delegation sent to form the new diocese to settle any property matters with the Russian Church, with no reference to a need to consult any existing diocesan authorities in making this settlement (PX 25, A. 1014). Furthermore, the history of the early years of the Diocese shows the Administrator organizing Diocesan institutions (such as the Ecclesiastical Court and Sabors) for the first time (DX 37, A. 1602-04; DX 49, A. 1605-06). All this occurred before the Diocesan constitution was adopted in 1927-28.

The May 11 Vote. Respondents rely upon a discussion at the May 11, 1963 meeting of the Holy Assembly about a proposal to elect three bishops for North America. Since this discussion occurred a day after Dionisije's suspension, Respondents argue that the proposal to elect three new bishops (instead of two) somehow indicates that the Holy Assembly had prejudged Dionisije's case (Resp. Br. 37). However, this conclusion, weak on its face, is refuted by a consideration of two additional facts:

1. The proposal which was voted upon by the Holy Assembly on May 11 suggested the appointment of only one full bishop and two vicar bishops to administer the three reorganized dioceses in North America. Thus the proposal did not call for the replacement of Dionisije as Diocesan Bishop. Firmilian was one of those nominated to be a vicar bishop. His appointment was suggested in order that he might administer the Midwestern Diocese during the suspension of Dionisije (DX 193, A. 1653).

2. Even in this innocuous form, the resolution did not pass (*id.*).

The Administrators' June 10, 1963 Letter. Respondents contend that the June 10 report to the Holy Synod by the three American clerics who had been appointed temporary administrators of the reorganized dioceses shows a conspiracy to "rush" Dionisije's trial and a predetermination of guilt (Resp. Br. 11-12).

In fact, however, a fair reading of the report indicates only a desire to proceed promptly with the disciplinary proceedings, in order to minimize the confusion and controversy which were being caused by Dionisije's defiance of the Holy Assembly and his repeated public charges that

the proceedings against him were instigated by the Communist government of Yugoslavia.*

By the time the administrators' June 10 letter was written, Dionisije had repeatedly announced that he would not obey the order of the Holy Synod suspending him. He had refused to relinquish the administration of the Diocese to Firmilian, the duly appointed administrator. He had repeatedly attacked the Patriarch, Holy Synod, and the Holy Assembly as schismatic, pro-Communist, atheistic and heretical. Finally, in a meeting of the Diocesan Plenum on June 6, Dionisije had summarily discharged Firmilian, his episcopal deputy, and two of his three vicars general, for daring to be loyal to the Mother Church rather than to Dionisije. Under these circumstances, the administrators in their report naturally and properly expressed concern about the demoralizing effect on the church in America of Dionisije's charges of Communist domination, stating (DX 198, R. 8336, A. 1665-66):

> "[I]f the Bishop's wrong doings are proved, decisions of the competent Church authorities will be unconditionally accepted. The hardship of this question was Bishop's statements, oral and in writing, that everything against him is coming neither from his wrong-doings nor from wishes of the Holy Assembly of Bishops, but under the pressure of [the] Communist regime in Yugoslavia. . . . His writings contributed much in increasing doubt about the truth of his wrong-doings by many. . . . With passing time, this doubt was increasing more and more among the people causing quarrels, debates, and a situation which may produce division and schism."

* See, e.g., Dionisije's circular letters of June 3 (PX 76, R. 2799, A. 1294) and May 25, 1963 (PX 74, R. 2755, A. 1287-88), his press release of May 27 (PX 84K, R. 3141-43), and the minutes of the June 6 meeting of the Diocesan Plenum (PX 106, R. 3099, A. 1413-14).

Therefore, the administrators asked that Dionisije be tried promptly

> ". . . because he is making confusion among the Serbs by his statements, that the Communist regime is after him through the Holy Assembly of Bishops and Synod" (*id.*, at A. 1671).

Dionisije's July 5 Meeting With the Investigating Commission. Respondents complain that the Investigating Commission abruptly terminated its July 5 meeting with Dionisije, issued a press release denouncing him, and failed to conduct the investigation and hearing required of it (Resp. Br. 26-28).

This argument ignores Dionisije's conduct, both before and at the July 5 meeting. Prior to July 5, Dionisije had repeatedly and publicly announced his defiance of the orders of the Holy Assembly and Holy Synod relating to the disciplinary proceedings against him. He charged that those proceedings were instigated by the Communists and that the Mother Church was controlled by the Communists.

After the Investigating Commission was appointed, Dionisije ordered that the delegation not be granted hospitality at the monastery at Shadeland, Pennsylvania. He wrote letters to the Investigating Commission, announcing that he would refuse to participate in any oral hearings they might conduct. On July 5 he turned his fellow bishops away from the St. Sava Monastery (the Diocesan See), and required them to meet in a restaurant.

During the meeting Dionisije did much more than object to the Diocesan reorganization as Respondents suggest (Resp. Br., App. pp. 18-19). He admitted authoring the inflammatory May 25 and May 27 circulars which the Commission had in their possession, and stated that he stood by all of his previous statements. He again refused to recognize the authority of the Holy Synod or the Commission, to recognize his suspension, or to participate in any oral

hearing. He proposed to deal with the charges only in writing* (A. 212-15; PX 82, R. 3060, A. 1324; DX 150, R. 6553, A. 1640; DX 152, A. 1646; DX 241, A. 1719).

Under these circumstances it is hardly surprising that the Commission concluded it could not proceed further with any hearings in view of Dionisije's defiance, and that his conduct constituted ample grounds for relieving him from his position. Nevertheless, the record indicates that the Commission did not rest there. Two Commission members, Bishop Chrysostom and Proto Deacon Tripkovich, remained in the United States, investigating the charges against Dionisije. (PX 197, A. 1535-43; A. 215.) The Commission's public announcement on July 6, describing their meeting with Dionisije and denouncing his defiant and schismatic activities, was an understandable response to the treatment they had received and to Dionisije's public statements. It is remarkable that Respondents complain of this one public statement by officials of the Mother Church, while condoning Dionisije's repeated inflammatory public statements.**

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* Dionisije had earlier indicated that he required the written charges against him so that he could sue his accusers in the civil courts (DX 218, A. 1687-88).

** Respondents also make two minor points which do not merit extended discussion. Without any basis in the record, they prefer to ascribe the appointment of the Investigating Commission on June 13 to the administrators' June 10 letter, rather than to the June 9 telegram request by Dionisije's followers on the Diocesan Plenum for a prompt hearing (PX 15, A. 929-30). But it is improbable that the June 10 letter had even reached the Holy Synod in Yugoslavia by June 13.

For some reason, Respondents repeatedly cite as significant evidence of fraud the fact that the Investigating Commission was instructed to "do what was necessary" or "appropriate" (A. 689, 232). (See Resp. Br. 12, 27, 28.) Respondents' attempts to read sinister significance into that instruction merely underscore the weakness of their position.

The Basis of the Removal of Dionisije as a Bishop. Finally, Respondents argue that the earlier charges which were the basis of Dionisije's suspension on May 10 (the pre-May 10 charges) were before the Holy Assembly when it relieved Dionisije as Bishop on July 27, 1963. From this doubtful premise, they jump to the conclusion that the Holy Assembly found him guilty of those charges without a hearing (Resp. Br. 13). There is nothing in the record to support that conclusion. Indeed, the evidence is to the contrary. Both the Commission's report recommending Dionisije's removal (which was adopted by the Holy Assembly) and the order removing Dionisije were explicitly based upon his refusal to recognize his suspension, the authority of the Holy Synod and the Investigating Commission, and his refusal to obey the orders of the Holy Assembly and the Holy Synod (PX 8, R. 2931-33, A. 919-23).

II.

ADOPTION OF RESPONDENTS' "VIOLATION OF INTERNAL CHURCH RULES" AND "FUNDAMENTAL FAIRNESS" STANDARDS OF JUDICIAL REVIEW WOULD SERIOUSLY IMPAIR THE CONSTITUTIONAL RIGHTS OF CHURCHES TO GOVERN THEIR OWN AFFAIRS.

Stripped of the half-hearted and groundless charges of some type of "fraud", Respondents' legal argument is based entirely upon the premise that civil courts are free to conduct *de novo* review of ecclesiastical proceedings, either to redress "fundamental unfairness" or to determine whether the proceedings deviated in any particular from the requirements of internal church regulations as interpreted by the civil courts.

As we pointed out in our original brief, this expansive concept of judicial review is not consistent with prior decisions and would impair the constitutional guarantees of religious freedom. Respondents merely cite several court decisions in support of the proposition that their view constitutes established law (Resp. Br., pp. 19-22). They ignore the difficult constitutional issues posed by their position. Their position is supported neither by precedent nor by constitutional principles.

Respondents do not dispute the conclusions stated in Petitioners' brief that this Court has never had occasion to apply the *Gonzalez dictum* or to define its scope and content. In Petitioners' original brief we pointed out that this Court's actual decisions on the subject, commencing with *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871), had all involved claims by dissident individuals or groups that officials of their hierarchical churches had taken action which was contrary to the internal church laws and regulations. In each case this Court refused to be drawn into considering the merits of the disputes relating to internal church laws.

Respondents' legal contentions are therefore really based upon a puzzling variety of decisions from lower federal courts or state courts, stretching over the period from 1893 to 1972 (Resp. Br. pp. 20-22). Respondents generally "string-cite" these cases, with little effort to show any analogy, factual or legal, to the situation in the case at bar.

In fact, Respondents' cases bear little factual similarity to the case at bar. Many do not even involve church organizations. The cases do not focus upon the constitutional issues presented in this action. Most sustained the challenged decision of the church or other organization. Of

the six cases cited by Respondents as rejecting church decisions for improper procedures (Resp. Br. 22), five involved congregational rather than hierarchical churches.

The following are examples of the inapposite nature of Respondents' authorities. *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), involved the question of whether the Securities Exchange Act created a duty of self-regulation so pervasive as to constitute an implied repealer of the antitrust laws. *Hendryx* v. *People's United Church of Spokane,* 84 P. 1123 (Wash. 1906), merely sustained the legal sufficiency of a complaint charging fraudulent conversion by a religious official of church property for his own personal use. *Le Duc* v. *Normal Park Presbyterian Church,* 142 F. 2d 105, 107 (7th Cir. 1944), sustained the finding of the Presbyterian Church that one of its former pastors was not entitled to past salary and pension benefits. *Merryman* v. *Price,* 259 N.E. 2d 883 (Ind. App. 1970), was decided on a "formal-title" basis, a doctrine clearly not applicable to this case. (See Petitioners' opening brief, pp. 55-59.) In *Turbeville* v. *Morris,* 26 S.E. 2d 821, 832 (1943), the South Carolina Supreme Court was asked to call a church council's decision "arbitrary" but saw the pitfall of entering into "intricate questions of the interpretation of ecclesiastical law extending back for more than a century," and refused to engage in the expansive judicial review which Respondents advocate. *Werner* v. *International Association of Machinists,* 11 Ill. App. 2d 258, 137 N.E. 2d 100 (2d Dist. 1956), upheld the expulsion of a member of a local lodge affiliated with an international labor union, and is most notable for its finding (favorable to Petitioners here in view of Dionisije's default) that the lodge properly tried its member's cause as a default matter when that member failed to appear at his hearing.

On the merits of the constitutional issue, Petitioners' opening brief noted that Respondents' expansive concept of "arbitrariness" as a basis for judicial review would necessarily involve the civil courts in a detailed parsing of internal church regulations. That concept would also encourage dissident groups to follow Dionisije's example and litigate internal church disputes in the civil courts.

The *amicus* brief filed by the Catholic Bishop of Chicago demonstrates that the largest of the hierarchical churches is seriously concerned that the precedent of the Illinois Supreme Court's decision will encourage civil court litigation of religious disputes and damage the freedom of churches to conduct their own internal affairs. Respondents' brief does not even discuss or attempt to refute these dangers. Respondents ignore the *amicus* brief.

More than a century ago, this Court recognized the dangers to internal church government represented by a standard of judicial review which permitted civil courts to determine whether internal church regulations had been followed. In *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871), this Court noted that it might be argued that an ecclesiastical tribunal exceeded its "jurisdiction" if (80 U.S. at 733):

> "... no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted. ..."

The Court pointed out the fallacy of this "jurisdictional" argument:

> "But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions."

Respondents go even beyond the "violation of internal church regulations" standard of the Illinois Supreme Court. Respondents seek to add to the hurdles of judicial review an amorphous requirement of "fundamental fairness" (Resp. Br. 20-21, 39-40).

It is difficult to imagine a doctrine more likely to make deep inroads upon the freedom of churches to govern their own internal affairs. Once "fundamental fairness" were adopted as a standard, there would be no safeguards (other than this Court's ultimate reviewing authority) against meddling into internal church affairs by state court judges anywhere in the country.

The potential for abuse is especially great in church cases, because many hierarchical churches have origins, customs and traditions which differ widely from the familiar concepts of American "due process" from which state judges are likely to fashion their notions of "fundamental fairness".

This case involves an ancient Eastern European Church. Its independent existence dates from 1219 A.D. and it derived from the still-older Eastern Orthodox Church with its See in Constantinople. Respondents argue that the civil

courts should impose American doctrines of "fundamental fairness" upon a proceeding involving the Mother Church's removal and defrockment of a bishop who was originally sent by the Mother Church from Yugoslavia.

As in our original brief, we decline to be drawn by Respondents into a detailed discussion of each of the disputed questions of internal church law relating either to the disciplinary proceedings against Dionisije or the Diocesan reorganization. The merits of those issues are inappropriate for this Court's review. In any event, Respondents' brief does not call for any reply on these issues. In the appendices to our opening brief we summarized the positions of the parties on the disputed church law questions, and set forth Petitioners' arguments on that subject. Respondents have been content to state their own positions on these issues (which are essentially the positions we predicted in our appendices) without attempting to reply to Petitioners' arguments or demonstrate wherein those arguments are in error.

There are, however, two related issues of great importance to the Dionisije disciplinary proceedings which require separate treatment, and are discussed in Section III.

III.

DIONISIJE'S DEFAULT AND HIS ADMITTED POST-MAY 10, 1963 ECCLESIASTICAL OFFENSES DESTROY RESPONDENTS' PROCEDURAL ARGUMENTS AND SUFFICE TO SUSTAIN DIONISIJE'S REMOVAL AND DEFROCKMENT.

In Petitioners' original brief we set forth in detail the facts relating to Dionisije's default (indeed refusal to participate) in the disciplinary proceedings. We also discussed the undisputed and serious ecclesiastical offenses Dionisije committed in the months following his suspension on May 10, 1963 (Petitioners' Br. 19-26).

Petitioners argued that, regardless of the merit of Respondents' procedural objections, Dionisije's default and his admitted ecclesiastical offenses are sufficient to satisfy any proper civil court review of those proceedings (Pet. Br. 60-64).

Dionisije's Default

Surprisingly, in view of the emphasis given this issue in Petitioners' brief, Respondents ignore Dionisije's default. Articles 66 and 70 of the Penal Code specifically provide that an accused is deemed to "acknowledge the transgression" if he does not comply with the summons, refuses to accept the summonses and decrees of the Court, or does not reply to the indictment (all of which apply to Dionisije's actions). *

These provisions of Articles 66 and 70 are not even mentioned in Respondents' brief or in the Appendix to that brief. Respondents do not discuss or even mention the concept of default. They do not set forth their construction of Articles 66 and 70, nor cite any testimony or internal church documents which would support any interpretation of those articles other than the plain meaning of the words, i.e., that refusal to answer the indictment, obey the

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* Article 66 provides (PX 69, R. 3036, A. 1262):

"If a person accused of a Church violation does not comply with the summons or refuses to accept the summonses and decrees of the Court, or does not choose to reply to them, it shall be considered that he acknowledges the act and Due Process shall be concluded without his participation."

Article 70 provides, in pertinent part (PX 69, R. 3036, A. 1264-65):

"Should the accused not submit his reply to the indictment within [the prescribed] period, it shall be considered that he acknowledges the transgression and that he waives that right."

Court's summonses and order, or otherwise participate, is equivalent to a plea of guilty and transforms the proceeding from an adversary situation into one which may be conducted by default. Instead, Respondents merely assume (without evidence or argument) that the rules relating to adversary proceedings in which the accused participates remain fully applicable after a default.

Petitioners submit that it was constitutionally impermissible for the Illinois Supreme Court to deny the Mother Church's right to treat Dionisije's defiance and obstruction as a default and to proceed to render default judgments under Articles 66 and 70 of the Penal Code.

As noted, Respondents never confront the default issue. Their only argument at all germane to the point is the claim that Dionisije "attempted to participate" but was somehow prevented from doing so by the Mother Church (Resp. Br. 35-39). Of the three contentions set forth in support of their position, Respondents' claim that Dionisije's guilt was "predetermined" has already been discussed at pages 12-17, *supra*.

The complaint that the indictment was amended in March, 1964 without notice to Dionisije ignores the facts relating to his prior conduct. Long prior to the amended indictment, Dionisije had refused to recognize his suspension, refused to recognize or participate in proceedings before the Investigating Commission, taken the dispute to the civil courts, refused to answer the original indictment and returned it, and repeatedly denounced the Mother Church as Communist controlled and the charges against him as Communist inspired. Under these circumstances, the Holy Assembly was fully entitled to treat the matter as a default under Articles 66 and 70, and proceed without Dionisije's participation. Indeed, no one reading

the record would doubt that Dionisije would have refused to respond to the amended indictment just as he refused to participate in all earlier proceedings. Furthermore, the matters charged in the amended indictment involved open and public acts and statements of Dionisije. Those acts have never been disputed by Dionisije and are not disputed in Respondents' brief.

Finally, Dionisije complains that he was not given written copies of the charges against him. This complaint is but one example of Dionisije's contention, supported by nothing in the record relating to church law, that the proceedings must be conducted precisely in accordance with his preferences and, if not, that he may refuse to participate without suffering the penalty of a default judgment. There is nothing in the Church Constitution or Penal Code which so provides. No witness testified that the default provisions were subject to this type of massive exception.

In any event, there is no substance to Dionisije's claim that Church procedure prevented him from defending himself against the charges. The Investigating Commission brought all of the written charges with them when they came to America. They were prepared to discuss those charges with Dionisije on July 5, 1963. However, he deliberately aborted that meeting by refusing to recognize the authority of the Holy Synod or the Commission, by insisting that he would not participate in any hearing or any oral discussion of the charges, and by stating that he stood behind all of his defiant statements. (A. 212-15.)

Dionisije's Admitted Ecclesiastical Offenses.

Quite apart from the issue of default, the undisputed public acts of Dionisije between May, 1963 and January, 1964 demonstrate his guilt of a number of serious ecclesiastical

offenses which justified his removal and defrockment. These offenses include his refusal to recognize the authority of the Holy Assembly, the Holy Synod, and the Investigating Commission; his repeated defiance of their orders; his attempted secession from the Mother Church; and his public denouncement of the Patriarch, Holy Assembly, and Holy Synod as pro-Communist and atheistic.

Respondents simply ignore this matter. They do not dispute the truth of the charges, and nowhere answer the contention that these ecclesiastical offenses justified the judgment against Dionisije. What purpose would be served by the Illinois Supreme Court's requirement that the disciplinary proceedings begin all over again, when these undisputed offenses show that Dionisije's public conduct has made his removal and defrockment virtually unavoidable?

IV.

RESPONDENTS' ATTEMPTED CROSS-APPEAL FROM THE DECISION WHICH REFUSED TO RECOGNIZE THEIR PURPORTED SECESSION IS NOT PROPERLY BEFORE THIS COURT AND IS WITHOUT MERIT.

Respondents argue that the Illinois Supreme Court departed from "neutral principles of law" in refusing to recognize Respondents' attempted secession from the Serbian Orthodox Church (Resp. Br. 17-19).

This issue is not properly before the Court. Respondents raised the issue by way of a conditional cross-petition for certiorari contained in their Brief In Opposition To Certiorari (Resp. Cert. Br. 20-23). This Court's order of October 20, 1975 granted the petition for certiorari, but did not grant the conditional cross-petition.

Furthermore, Respondents did not raise the claim that non-recognition of their secession violated the federal constitution until they filed their briefs in this Court. Therefore, the issue was not properly raised or preserved for review by this Court. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). Indeed, Respondents' constitutional argument has been changed since certiorari was granted. Respondents' conditional cross-petition for certiorari complained of an alleged denial of equal protection of the laws (Resp. Cert. Br. 20). However, Respondents' brief on the merits proceeds on an entirely different theory, *i.e.,* that the Illinois Supreme Court decided a religious issue by an alleged finding of "religious unanimity" (Resp. Br. 17-19).

If the Court should consider this issue to be properly presented for decision, the record demonstrates that Respondents' new argument is without merit.

Wholly apart from the grounds upon which the Illinois Supreme Court relied, Respondents' attempted secession was ruled invalid by the Holy Assembly of Bishops (DX 254, A. 1758-59). The interpretation of the internal church regulations regarding the right of secession was a matter as to which the good faith decision of the Holy Assembly was binding and conclusive.

Moreover, the grounds relied upon by the Illinois Supreme Court in its decision on secession were not improper. Respondents' argument is predicated upon the theory that the Illinois Supreme Court invalidated their purported secession only by delving into religious matters and determining that there was continuing "religious unanimity" between those loyal to the Mother Church and the Dionisije faction. But this is a plain misreading of the Illinois Court's decision. That Court decided the issue on two alternative grounds, neither of which involved an inquiry into religious faith (A. 1831-1833). *

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* The Illinois Appellate Court (A. 31) and the trial court (A. 1788) reached the same result on the same basis.

The Illinois Supreme Court found that the constitutions of the Mother Church and of the American/Canadian Diocese contain no provisions for unilaterial secession or withdrawal. Consequently, the court concluded that the constitutions themselves would provide no basis to recognize the validity of Respondents' secession. Indeed, there is no evidence, authority, or precedent in the record or briefs upholding the legality of a Serbian Orthodox Diocese leaving the Church of which it is a part.

As another alternative, the Illinois Supreme Court considered and rejected Respondents' "compact" theory. Respondents make the technical, legal argument that the relationship between the Mother Church and the American/Canadian Diocese is merely a "compact" or "contract" and that, regardless of intention,* the Diocesan reorganization amounted in law to a breach which gave rise to a right of rescission or secession by the Dionisije faction.

To this argument the Illinois Supreme Court made the obvious response that the relationship in question was a religious union, not a mere "compact". Consequently, the reorganization of a Diocese, even if done in violation of the provisions of the internal church constitutions, would not in law give rise to a right of rescission.

The Illinois Court's characterization of the relationship is obviously correct** and does not involve determining questions of religious faith to any greater degree than would have been the case if the Court had adopted the characterization of the relationship implicit in Respondents' "compact" theory.

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* Of course, no one seriously argues that the Mother Church actually intended in 1963 to cut itself off from or repudiate its relationship with the church members in North America.

** Indeed, Respondents themselves characterize the connection as "a spiritual-hierarchical relationship which was sacramental in nature" (Resp. Br. 17).

Respondents, as individuals, were and are free to leave the Mother Church and form a new religious organizaton. What Respondents seek to achieve in the case at bar is judicial recognition of Respondents' attempt to secede the Diocese as an entity, their claim to represent the "true" Serbian Orthodox Church in this country, and their exclusion of the majority group faithful to the Mother Church from participation in Diocesan affairs and use of Diocesan property. Acceptance of Respondents' secession argument would involve this Court in a truly religious determination—that the Dionisije faction constitutes the "true Serbian Orthodox Church in the United States".

CONCLUSION

For the reasons stated in this brief and in Petitioners' opening brief, Petitioners ask that this Court reverse the portions of the decision of the Illinois Supreme Court from which they have appealed and grant the relief requested in Petitioners' opening brief.

Respectfully submitted,

JENNER & BLOCK
One IBM Plaza,
Suite 4400
Chicago, Illinois 60611
(312) 222-9350

ALBERT E. JENNER, JR.
KEITH F. BODE
ROBERT L. GRAHAM
LELAND J. BADGER
EUGENE R. WEDOFF

KATZ, KARACIC & HELMIN
180 North LaSalle Street
Suite 3001
Chicago, Illinois 60601
(312) 236-4111

THOMAS J. KARACIC

HALL, MEYER, FISHER,
HOLMBERG, SNOOK & MAY
25 North County Street
Waukegan, Illinois 60085
(312) 244-0600

HENRY D. FISHER

Attorneys for Petitioners